United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 981

Case No. 1075: MASRI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas, on 15 March 1999, Rami Antoine Masri, a former staff member of the United Nations, filed an application containing pleas which read as follows:

"**SECTION II. PLEAS**

Applicant prays the Tribunal to ...:

1. [Rescind] the contested decision of termination of services.

2. [Reinstate the] Applicant to duty.

3. [Consider] the period of absence special leave with full pay.

4. [Pay] compensation for the injury sustained, including compensation for the premeditated delay in process.

5. [Pay] counseling fees and secretarial expenses, estimated at US$ 500."

Whereas the Respondent filed his answer on 15 December 1999;

Whereas the Applicant filed written observations on 28 January 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Disengagement Observer Force (UNDOF) on 14 December 1992, as a Clerk/Typist at the G-3 level, on a one-month and eighteen-day short-term appointment. On 1 February 1993, his appointment was converted to a three-month fixed-term appointment under the 100 Series of the Staff Rules. His fixed-term appointment was extended several times until 30 November 1996, when he was separated from service.

On 22 November 1996, the Chief, Personnel Management and Support Service, Division of Peacekeeping Operations (DPKO), faxed a memorandum to the Chief Administrative Officer, UNDOF, indicating that "[the Applicant] should be separated when his fixed-term appointment expires on 30 November 1996". On 25 November 1996, the Chief, Civilian Personnel, UNDOF, in a memorandum to the Applicant advised him of the decision of the Office of Human Resources Management (OHRM) that he would be separated from UNDOF on 30 November 1996. The memorandum referred to an earlier meeting held on 20 November 1996 with the Applicant when he was allegedly advised that his contract would not be renewed because his brother was also employed by UNDOF.

On 17 December 1996, the Applicant wrote to the Secretary-General appealing the decision not to renew his contract, alleging that he was improperly and arbitrarily terminated due to his failure to reveal that his brother was a staff member when he filled out his employment application. At the time, the Chief Administrative Officer and the Personnel Officer who interviewed him were both aware that his brother worked for another division of UNDOF and it was his brother who arranged for the interview. The Applicant cited staff rule 104.10 in support of his position, which he claimed permits employment of a relative when another equally well qualified candidate cannot be recruited. He also claimed that since his post remained vacant, the Rule did not bar renewal of his contract.

On 7 March 1997, the Applicant not having received a response, lodged an appeal with the Joint Appeals Board (JAB) alleging that the Administration knew of his brother's employment at the time he was hired, and requesting a reversal of the decision not to renew his contract.

On 6 July 1998, the Applicant requested the Secretary of the JAB to proceed with his appeal on the merits, since the Respondent had failed to file a reply for over a year. On 22 September 1998, the JAB submitted its report, observing that in the absence of the Respondent's reply, it was constrained to render an "independent determination based on the information already before it - the Applicant's status file and his statement on appeal."

Its considerations and recommendations read as follows:

"*Considerations ...:*

...

18. The Panel noted the Appellant's argument that his superiors were aware of his brother's employment with the UN, even before he was recruited. It also observed that when the Appellant filled out the Personal History form, he failed to answer the question as to whether he had any relative employed with the UN. In this regard, the Panel noted that the Appellant's superiors at UNDOF did not request that he properly fill out the application form, which may have been tantamount to contributory negligence.

19. It was the Panel's opinion that the Administration had at least constructive knowledge of the brother's employment with the UN, as evidenced by its failure to ascertain the Appellant's eligibility for employment.

20. The Panel noted that the Appellant served at UNDOF for four years on several fixed-term appointments, without the Administration taking any action to redress his situation. This, in the opinion of the Panel, constituted a serious administrative error, which created a reasonable belief on the Appellant that, pursuant to the exception contained in staff rule 104.10 (a), he was eligible for employment with the UN, his brother's employment notwithstanding.

21. The Panel further noted that the Appellant relied to his own detriment, on the Administration's knowledge (or constructive knowledge) of his brother's employment with the UN, and that such detrimental reliance was reasonable under the circumstances.

22. It was the Panel's view that the Administration did not follow proper procedure in the recruitment of the Appellant, and in the retention of his services for four years. This administrative error created a reasonable expectancy of continued employment on the Appellant. The Panel was of the view that the Administration should be estopped from invoking the provisions of staff rule 104.10 (a) to decide the non-renewal of the Appellant FTA [fixed-term appointment]. To the contrary, the Panel felt that the Administration could

use the exception contained in this rule to allow the continuous employment of the Appellant. (The provisions of staff rule 104.10 (a) stipulate that the Organization may recruit a person whose brother, sister, son, daughter, father or mother is a U.N. staff member if another well-qualified candidate cannot be recruited.)

Recommendations

22. In light of the foregoing facts, the Panel *unanimously recommends* that:

(a) The Appellant be reinstated to his post, … [o]r in the alternative,

(b) The Appellant be paid 14 months net base salary and attendant benefits, representing the period from the date of the filing of the appeal to the date of the consideration of it by the JAB Panel."

On 5 October 1998, the JAB forwarded its report to the Under-Secretary-General for Management advising him that the Respondent's reply was received ten days after the Panel completed its consideration of the case and was not considered by the Panel in making its decision.

By memorandum dated 9 October 1998, the Under-Secretary-General for Management informed the Secretary of the JAB as follows:

"…

2. I have decided to remand the appeal of [the Applicant] to the Joint Appeals Board for consideration, as it is not in the interest of the Secretary-General, or of an appellant, to have cases considered on the basis of one-sided accounts. Before I can consider, on behalf of the Secretary-General, a recommendation, especially a recommendation for the award of monetary compensation, I must be confident that the recommending body has gathered all the facts necessary for a full consideration of the issues raised by both parties, and not just one, and that its report reflects this full consideration."

The JAB submitted its second report on 2 December 1998. Its conclusions and recommendations read as follows:

"***Conclusions and Recommendations:***

22. The Panel, after reexamining the whole case in the light of the Respondent's reply, unanimously adopted the conclusions and recommendations contained in its previous report

dated 22 September 1998. (...)."

On 15 March 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General does not agree with the Board's conclusions. He first considers that the onus of providing complete and accurate information when filling out the Personal History form is on you and the Administration's reportedly 'constructive knowledge of [your] brother's employment with the UN' does not detract from your responsibility to provide such information. The Secretary-General further considers that the strict application of staff rule 104.10 (a) on family relationships would have precluded your employment with UNDOF. The fact that you were granted a fixed-term appointment where you would ordinarily not have been employed does not create an expectancy of, or a right to, continued employment, or of compensation in lieu thereof.

In light of the foregoing, the Secretary-General cannot accept the Board's recommendation that you be reinstated to service with UNDOF or that you be paid 14 months net base salary and attendant benefits. The Secretary-General has decided to take no further action on your appeal.

..."

On 15 March 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to renew the Applicant's contract on the grounds that he failed to reveal that his brother was a UN staff member at the time of his hiring was improper and unwarranted.

2. The facts substantiate the Applicant's claim that the Respondent was aware of his brother's employment status when the Applicant was hired which fact constitute a waiver of any alleged violation of Staff Rules by the Applicant.

3. The Applicant's length of service created an expectation of continued employment.

4. The Respondent's lengthy delay in responding to the Applicant's appeal before the JAB was unreasonable and violated the Applicant's due process rights.

Whereas the Respondent's principal contentions are:

1. The Applicant was on a fixed-term appointment which expires on the date stated in the letter of appointment. The fixed-term appointment does not carry any expectancy of renewal. The decision of the Administration not to renew the Applicant's contract did not violate his rights.

2. Events regarding the Applicant's failure to declare a family relationship did not undermine the discretionary authority of the Secretary-General not to renew the Applicant's fixed term appointment.

3. The Applicant did not sustain any material or moral injuries as a result of the Administration's actions, and is not entitled to compensation. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 30 October to 21 November 2000, now pronounces the following judgement:

I. The Applicant claims that the Respondent's decision not to renew his fixed-term contract due to the fact that he did not reveal in his Personal History form that his brother was a UNDOF staff member at the time should be rescinded and that he should be either reinstated or compensated accordingly.

II. Regarding his omission, the Applicant alleges that the Administration had "constructive knowledge" of his brother's employment and, consequently, staff rule 104.10 (a), does not apply. The rule provides as follows: "Except where another person equally well qualified cannot be recruited appointment shall not be granted to a person who bears any of the following relationships to a staff member: father, mother, son, daughter, brother or sister."

III. The Respondent, on his part, does not deny such "constructive knowledge" but maintains that, "it would not affect the Applicant's obligation to correctly complete his Personal History form". The Respondent informed the Applicant that "the onus of providing complete and accurate information when filling out the Personal History form is on you and the Administration's reportedly 'constructive knowledge of [your] brother's employment with the UN' does not detract from your responsibility to provide such information."

IV. The Tribunal is of the view that the Applicant's omission when filling out the Personal History form must be considered in conjunction with the acceptance by the Administration of the application. The implication is that the information received was satisfactory to the Administration and that it, by its acceptance, waived the necessity of including that information.

V. The Applicant, then, may have been justified in his belief that such information as he omitted was not relevant to his being appointed as a staff member. He did not mislead the Organization as he did not deny having a brother who was staff member.

VI. The United Nations cannot act but through the intermediary of its agents. The conduct of such agents is imputed to the Organization, and the Organization must remain bound by their actions. The Administration that accepted the original application is the same Administration that wants to find fault with this application, ratified through several renewals of the Appellant's appointment, four years later. That is a contradiction.

VII. Staff rule 104.12 (b) (ii), invoked by the Respondent provides that fixed-term appointments do not carry any expectancy of renewal or of conversion to any other type of appointment. The discretion of the Secretary-General to renew or not to renew a fixed-term contract is wide, but it has, however, its limits. Administrative decisions affecting a staff member must not run counter to certain concepts fundamental to the Organization. They must not be improperly motivated, they must not violate due process, they must not be arbitrary, taken in bad faith or be discriminatory.

VIII. The Tribunal finds that the Administration has not proceeded in good faith. It has treated the Applicant badly. Suddenly denying him his legitimacy as a staff member, after having considered him as an employee and periodically renewing his employment for four years, is indeed bad faith. The improper motivation and the arbitrariness of the Administration are evident from the reasons given to the Applicant for not renewing his contract.

IX. In Judgement No. 440, *Shankar*, the Tribunal found that the Applicant, a staff member on a fixed-term contract had no legal expectancy of continued employment. It added that "[a]fter reviewing the circumstances of the case, the Tribunal agrees with the Joint Appeals Board's finding that the non-renewal of the Applicant's fixed-term appointment was vitiated by lack of due process, lack of good faith and procedural irregularities" and ruled for the Applicant. The Tribunal, in the present case, reaches a similar conclusion: the Administration's motives were improper.

X. Another aspect of this case, that merits special consideration is the year-long delay by the Respondent in replying to the Applicant's appeal to the JAB. The excuse offered by the Administration each time it asked for an extension of the time-limit, was that the "office is actively engaged in obtaining all the information necessary to complete the statement on behalf of the Secretary-General". The Tribunal notes that, finally, the JAB decided to consider the case without the Respondent's reply and recommended in favour of the Applicant. It also notes that the Under-Secretary-General for Management remanded the appeal to the JAB for re-examination, because he felt that "it [was] not in the interest of the Secretary-General, or of an [a]ppellant, to have cases considered on the basis of one-sided accounts", adding that before considering a recommendation, "especially a recommendation for the award of monetary compensation, [he] must be confident that the recommending body ha[d] gathered all the facts necessary for a full consideration of the issues raised by both parties, and not just one, and that its report reflect[ed] this full consideration". However, the Tribunal finds that this explanation does not excuse the conduct of the Administration for its inordinate delay in answering the appeal, but that indeed ironically the entire situation was the sole creation of the Administration.

XI. In light of the foregoing, the Tribunal:

(a) Orders the Respondent to pay the Applicant 18 months net base salary at the rate in effect at the time he was separated from service as compensation;

(b) Rejects all other pleas.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary